

# Chicago-Kent Law Review

---

Volume 70

Issue 4 *Symposium on Ancient Law, Economics & Society Part I: The Development of Law in Classical and Early Medieval Europe / Symposium on Ancient Law, Economics & Society Part I: The Development of Law in the Ancient Near East*

Article 3

June 1995

## Foreword: Social Practices, Legal Narrative, and the Development of the Legal Tradition

Laurent Mayali

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

---

### Recommended Citation

Laurent Mayali, *Foreword: Social Practices, Legal Narrative, and the Development of the Legal Tradition*, 70 Chi.-Kent L. Rev. 1469 (1995).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol70/iss4/3>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact [dginsberg@kentlaw.iit.edu](mailto:dginsberg@kentlaw.iit.edu).

# FOREWORD: SOCIAL PRACTICES, LEGAL NARRATIVE, AND THE DEVELOPMENT OF THE LEGAL TRADITION

LAURENT MAYALI\*

"In America the Law is king." Thus spoke Thomas Paine when asked to define the nascent American republic at a time when its legitimacy could at best be considered the improbable result of a revolutionary process that had sounded the death knell of the existing legal and political order. Paine's self-conscious representation of the young state reflected, as R. Ferguson has noted, "[T]he centrality of law in the birth of the republic. . . ."<sup>1</sup> Despite the revolutionary outcome of this American genesis, Paine's claim was not surprising. It was the product of a legal tradition which can be traced back beyond the Middle Ages to its Roman roots, a tradition that long ago associated the authority of the law with the exercise of political power.

In his successful attempt to revive the long-lived Roman legal tradition, the emperor Justinian presented himself as the living law on earth (*lex animata in terris*).<sup>2</sup> Justinian's daring claim would not be forgotten. Centuries later, medieval lawyers used it to justify the sovereign prerogatives of ambitious feudal princes who wished to strengthen their new puissance.<sup>3</sup> By then, the combination of law and power, as expressed in the concepts of *imperium* and *iurisdictio*,<sup>4</sup> had given rise to an auspicious political discourse.<sup>5</sup> The significance of this timely development, however, was far from obvious to all medieval people. For once, the Roman law did not provide a clear and functional definition of the state. Moreover, the feudal society was organized along principles of personal solidarity and private interest which largely ignored the notion of public sovereignty. It was, therefore, es-

\* Professor of Law and Director of the Robbins Religious and Civil Law Collection, University of California at Berkeley School of Law.

1. R. Ferguson, *Law and Letters in American Culture*, Cambridge Mass. 1984, pp. 11-33.

2. *Corpus iuris civilis*, Novella, Nov. 123.

3. L. Mayali, *Lex animata, rationalisation du pouvoir politique et Science juridique* (XIIe-XIVe siècle), *Re naissance du pouvoir a legislatif et genese de l'Etat*, Montpellier 1998, pp. 155-165.

4. For further discussion of this question, see P. Costa, *Iurisdictio: semantica del potere politico nella pubblicistica medievale* (1100-1433), Milan 1969.

5. J. Vallejo, *Ruda equidad, ley consumada. Concepcion de la potestad normativa* (1250-1350), Madrid 1992, pp. 40-49.

sential for the princes' counselors to trace the origin of the prerogatives of their royal patrons to the preexistent Roman law.<sup>6</sup> In this process, Justinian's legacy was somewhat transformed. Included in the formula—the king was the law—was the belief that, likewise, the law was king.

In Thomas Paine's view, the legitimacy of the new political order was founded upon a conception that the state was the ultimate outcome of the legal reason and its corollary, the rule of law. By the beginning of the twentieth century, the concept of *Staatsrecht* had become a significant element of Western political culture. Set at the nexus of both the legal and political orders, it instituted a normative space where a given society could be organized according to principles that authenticated its identity and guaranteed its legitimacy. Nowadays, this forceful juridical emphasis is one of the most distinctive attributes of the modern state. According to this model of government, the state and the law appear to be intrinsically bound to one another; they share a common political fate. But the significance of this model expands its consequences beyond the initial institutional paradigm; the concept of the legitimate state, as the ideal form of political organization, defines also a way of personal life and a mode of social behavior that confirms mankind's unique place in the natural order.<sup>7</sup> In other words, the *Staatsrecht* became a metaphor for the unique character of a human society that, as noted long ago by Cicero, may claim its superiority over the violent chaos of the animal world.<sup>8</sup>

This view had practical implications. By 1900, when the first international congress of comparative law took place in Paris, it was clear that civilized nations shared the same legal heritage. Furthermore, this common background was not affected by the division between the common law system and the civil law system. Lawyers from both legal traditions could easily agree with Oliver Wendell Holmes on the existence of universal and civilized legal principles. In the civil law system, statutory legislation came to be viewed as the expression of human reason as reflected by the ancient Roman imperial wisdom. The various preambles studied by M.T. Fögen show the permanence of this

6. F. Calasso, *I Glossatori e la teoria della sovranità: studio di diritto comune pubblico*, Milan 1951, 224 pp.

7. Aristotle, *Politics*, I, ii, 1258a.

8. Cicero, *De Oratore*, I, viii, pp. 33-34: "To come, however, at length to the highest achievements of eloquence, what other power could have been strong enough either to gather scattered humanity into one place, or to lead it out of its brutish existence in the wilderness up to our present condition of civilization as men and as citizens, or, after the establishment of social communities, to give shape to laws, tribunals and civic rights?"

belief from the Roman empire up to the contemporary European Union.<sup>9</sup> Under rhetorical language, these introductions reveal the constant concern of their authors to define their own position as community leaders. Roman emperors such as Justinian often claimed that the superior ambition of leadership was best expressed in the exercise of its legislative power.<sup>10</sup> Diocletian's concerns with the financial prosperity and monetary stability of the empire led him to enact a series of regulations on prices. But the emperor's edict was more than a detailed set of technical rules; it also illustrated the crucial role of the law in safeguarding the Roman *humanitas*. In Fögen's words, a comparable "sense of ever-lasting cultural identity" is found in the heated debates opposing the French revolutionaries. By then, however, the democratic conception of legislation as the expression of the people's will had achieved a fusion of law and national identity in the collective consciousness, and preambles became superfluous. Yet this form of national self-confidence did not last long. The tragic events of the twentieth century shattered the indulgent confidence of the European states, and, as a result, preambles were once again needed. Although there is nothing in common between Nazi statutes and the regulations of the European Union, both share the same predilection for preambles. Eventually, however, people knew on which side mankind's future stood. Were they to forget, new preambles to new statutes would refresh their memory.

The conception of a civilized world as a world ruled by law was perhaps essential to defining the identity of Western society.<sup>11</sup> This unique phenomenon appears at the end of the eighteenth century and is fully developed in the following century. However, its roots lie in a legal reason born from the ideas of legal scholars in the last centuries of the Middle Ages. Although this medieval legal renewal did not instantly produce a complete legal system, it was the product of a scientific revolution that provoked the development of a legal consciousness and its expansion into other cultural fields.<sup>12</sup> At the beginning of the twelfth century—a period during which the intriguing Roman legal sources draw the attention of a handful of jurists—medieval legal

9. M.T. Fögen, *The Legislator's Monologue*, 70 *Chicago-Kent Law Review* 1593 (1995).

10. Justinian's Institutes, prooemium, "Imperial majesty should not only be graced with arms but also armed with laws, so that good government may prevail in time of war and peace alike." ed. P. Krueger, Berlin 1893, trans. P. Birks and G. McLeod, Cornell University press, 1987.

11. For further discussion of the dualism of civilization-civil Law, see P. Legendre, *Les enfants du texte: étude sur la fonction parentale des états*, Paris 1992, p. 65 ff.

12. E. Cortese, *Il rinascimento giuridico medievale*, Roma 1992, 141 pp.

thought was still limited by its methods and objectives.<sup>13</sup> In this vacuum, usages and traditional customs<sup>14</sup> formed a normative system that provided the tool for regulation of daily life.<sup>15</sup> Altogether, this newly rediscovered Roman law was baffling; it conveyed the components of a legal culture which the medieval people could not understand. During its long history, Roman law had gradually achieved a high level of casuistic reasoning that had altered, in many ways, the representation of the real and physical world.<sup>16</sup> This special combination of a pragmatic approach to social issues with sophisticated legal argumentation explains why the Roman jurists were able to formulate, over several centuries, sensible solutions to the needs of a changing society. In this process, most of the aspects of public and private life were being addressed and framed within an authoritative legal structure.<sup>17</sup> Such a process of juridification has been observed by C. Paulus<sup>18</sup> and D. Johnston<sup>19</sup> in the spheres of family relationships and business and social relations, respectively.

The family, which was considered the foundation of Roman society since its origins, commanded special attention. Over a period of several centuries, the relationship between parents and children had undergone some fundamental changes. In rural Rome, absolute paternal power had been the fundamental principle of family governance. But in the late republic, Rome expanded its boundaries to the edge of this known world. The resulting transformation of an autarchic agricultural market into a complex economy based on international trade and financial transactions provoked a new distribution of riches and power. New opportunities arose along with different social values. As a result, family traditions were increasingly challenged and social norms were ultimately unable to prevent the collapse of the ancestral model. Such a threat was met with a legal response. Con-

13. H. Kantorowicz, *Studies in the Glossators of the Roman Law*, Cambridge 1938, 323 pp.

14. See for instance, the use of the "convenientia" in Southern France and Northern Italy, P. Ourliac, *La convenientia*, in *Etudes d'histoire du droit medieval*, Paris 1979, vol. 1, pp. 245-254 and G. Nicolaj, *Cultura e prassi di notai preirmeriani. Alle origine del rinascimento giuridico*. (Ius nostrum. Studi e testi pubblicati dall'istituto di storia del diritto italiano dell'università di Roma), Milan 1991, pp. 40-57.

15. On the distinction between law and norm, see F. Ewald, Michel Foucault et la norme, in *Fremde der Gesellschaft: historische und sozialwissenschaftliche Untersuchungen zur Differenzierung von Normalität und Fremdheit*, (Ius Commune, Sonderhefte 56), Francfort am Main 1991, pp. 1-16.

16. F. Schulz, *History of Roman legal science*, Oxford 1946, 358 pp.

17. A. Watson, *The Spirit of Roman Law*, Athens, Georgia 1995, 241 pp.

18. C. Paulus, *Changes in the Power Structure within the Family in the Late Roman Republic*, 70 *Chicago-Kent Law Review* 1503 (1995).

19. D. Johnston, *Limiting Liability: Roman Law and the Civil Law Tradition*, 70 *Chicago-Kent Law Review* 1515 (1995).

cretely, legislation defined the family while delimiting the rights and obligations of its members. For the Roman *paterfamilias*, as well as for his children, the law also had a broader significance; it provided the common background and the language to reconcile personal preference with public necessity. In a society where the cult of the forefathers was essential to the definition of everyone's identity, the Roman *paterfamilias's* preference for testate succession revealed a deep-seated concern for his after life as well as for the future of his family. As C. Paulus shows, the last will and testament was a legal monument which ultimately secured the prosperous fate of the family while preserving forever the memory of the deceased.

A similar legal evolution may be observed outside the family domain in the area of contract and delict liability. Here, the legal doctrine defined a model of social and business relations adapted to the requirements imposed by fundamental social and economic changes. Over a period spanning several centuries, the Roman jurists introduced the principle of limited liability which encompassed both the contractual and delictual aspects of an individual's acts. What mattered was the unfailing concern for a legal solution which was not only acceptable to the parties but also would warrant the respect of public policy. Contractual liability was initially limited to the parties bound by the contract. This principle was revised in order to accommodate new demands for the protection of their creditors' interests. This expansion to third party liability required precise limitations, which were achieved by setting up financial as well as functional limitations. Financial limitations were imposed in the matter of delictual liability, based on a relation of status, as in the case of slaves and children in power; the functional limitation was ignored in the law of delict. To the contrary, in the seventeenth and eighteenth centuries, when Dutch and French jurists adapted the principles of the Roman law to the needs of their time, financial and functional limitations were reconsidered in a different way. By then, the financial limitation seemed preferable in the matter of contractual liability, while the functional limitation provided a satisfactory mode of limiting liability in the law of delict.

Since the time of the Twelve Tables, the legendary first promulgation of Rome's unwritten laws, the country's fortune was closely associated to the law. For centuries, Roman citizenship was a legal privilege that symbolized a distinctive identity under the rule of the

*ius civile*.<sup>20</sup> Yet, by modern standards, statutory legislation was rather scarce during the Republic. The pragmatic method of the *praetor* favored remedies over rights. As limited as it was, this legal corpus provided support for a much needed interpretation, a task that previously had been the pontiffs' prerogative and later characterized the jurists' role. Nevertheless, as P. Stein<sup>21</sup> notes, this intellectual movement and its different schools failed to provide a comprehensive conception of an organized legal system. The unique character of Roman jurisprudence was preserved in the late Justinian's compilations; in fact, the bulk of this monumental work comprised an extensive collection of the selected works of earlier Roman jurists.

By the beginning of the twelfth century, centuries after the collapse of the Western Roman Empire, memories of its legal achievements had long disappeared. Therefore, the abrupt and still unexplained revival of Roman law in Northern Italy prompted the medieval jurists to reconsider the existing normative system which had so far sustained few challenges. The problem that faced the first glossators of the Roman law was to reconcile the Roman legal reason with the feudal society and its distinctive political structure. Within one century, medieval society witnessed significant changes which transformed its traditional modes of representation. Religious and legal ideas inspired a new self-consciousness among the social elite. In this intellectual ambience, the legal science was perceived as a universal knowledge that Paulus de Castro, a fifteenth-century jurist, would later claim "was the noblest of all sciences since it made man better."<sup>22</sup> In this process, the question of legal knowledge encompassed human affairs as well as divine matters, as claimed in an excerpt from the Roman jurisconsult Ulpian's work inserted in Justinian's Digest. In Ulpian's Rome, this allusion to the divine things denoted a particular meaning; it comprised the administration and the regulation of the Roman religion which constituted part of the public law. The advent of Christianity gave it new meaning and the medieval faith confirmed this evolution.<sup>23</sup> The ancient Roman distinction between natural law

20. Y. Thomas, *Citoyens et Residents dans les Cites de l'Empire Romain. Essai sur le droit d'origine*, in *Identité et droit de l'autre*, ed. L. Mayali, Studies in Comparative Legal History, Berkeley 1994, pp 1-56.

21. P. Stein, *Interpretation and Legal Reasoning in Roman Law*, 70 *Chicago-Kent Law Review* 1539 (1995).

22. Paulus de Castro, In Digestum vetus Commentaria, D.1.1.1., *Iuri operam daturum*, fol. 2rb, Venice 1593.

23. For further discussion of the dualism between divine law and human law, see E. Cortese, *Lex, Aequitas, Utrumque Ius nella Prima Civilistica*, in *Lex et Iustitia nell'Utrumque*

and civil law was interpreted accordingly. As an expression of God's will, natural law was nothing but divine law, while civil law was a human feat.

This combination of the spiritual and temporal orders was further developed in the Church's own law. Here, the order of the different normative sources reflected the preeminence of the spiritual world over the temporal one. The conciliar canons and the papal legislation came second to the Holy Scriptures and the works of the Church's Fathers. This strict hierarchy in favor of the more religious texts did not ignore the jurists' competence. R.H. Helmholz shows how all the legal sources including the Bible were subjected to their interpretation and comments.<sup>24</sup> The full development of the canon law from the middle of the twelfth century onward merged the Church's biblical tradition with the Roman legal legacy. In this process, Helmholz keenly observes, the Bible was considered by the canonists as a fundamental norm that warranted both the legitimacy and the authority of the legal order. In doing so, the canonists were able to develop a particular mode of legal reasoning which would eventually influence the secular conception of the modern constitutional state.

The dualism of divine will and human feat also defined the fundamental relationship between justice and law.<sup>25</sup> Since the Gregorian Reform of the Church's institutions and discipline in the eleventh century, the papacy had strongly stressed the exemplary value of justice for the harmonious life of the Christian society. The study of the new law and its enforcement could not be dissociated from the idea of justice. According to a twelfth-century jurist, "[Justice] is not the main topic but the basis of law, indeed its very substance."<sup>26</sup> As noted by Walter Ullmann, "the supreme criterion of all medieval considerations in the field of the theoretical and practical jurisprudence was the realization and concrete manifestation of the idea of justice."<sup>27</sup> But the development and implementation of a judicial model that could achieve this goal required the creation of a new judicial procedure and

Ius: *Radici Antiche e Prospettiva Attuali, Utrumque Ius. Collectio Pontificiae Universitatis Lateranensis*, 20, Vatican 1989, p. 95119.

24. R.H. Helmholz, *The Bible in the Service of Canon Law*, 70 *Chicago-Kent Law Review* 1557 (1995).

25. Bulgarus, *Materia Institutionum*, "God is the authority of justice while man is the authority of the law" cited by S. Kutner, *A Forgotten Definition of Justice*, in *The History of Ideas and Doctrines of Canon Law in the Middle Ages*, London 1992, v, p. 78 n.17.

26. F. de Zulueta and P. Stein, *The Teaching of Roman Law in England around 1200*, London Selden Society, Supplementary Series, vol. 8, 1990, p. 8.

27. W. Ullmann, *The Medieval Idea of Law as Represented by Lucas de Penna*, London 1946, p. 35.



a judiciary system which differed from the traditional modes of conflict resolution.<sup>28</sup> During this process, a new form of public justice was gradually substituted for private justice.<sup>29</sup>

As K. Fischer Drew observes, for centuries, the ruling powers had granted local jurisdictional privileges in order to warrant the loyal support of their allies. This political practice became prevalent in the feudal society.<sup>30</sup> Each local lord could thus exercise the power of justice that was attached to his fief. During the late Middle Ages, the strengthening of a central authority in the hands of the ascending monarchs was eventually achieved through the centralization of the judicial system. The formation of the romano-canonical procedure<sup>31</sup> and the renown of the royal and ecclesiastical courts were the main factors of this evolution.<sup>32</sup> By then, the role of the public authorities in the administration of justice was much different than in the early system of social conflict resolution that had replaced the Roman law after the collapse of the empire in Western Europe.

In conclusion, it is important to remember, as J. Whitman does,<sup>33</sup> that this result was not the ultimate product of the evolution of a subjective legal consciousness. From this perspective, the early development of a uniform system of resolution of social violence in the so-called archaic codes, which were in circulation in various societies during a period of several thousands of years, was often viewed as the first manifestation of the state authority. According to this well-established interpretation, these codifications resulted in the progressive control of private violence and its eventual eradication by the ruling power. But, according to Whitman, this representation of the so-called "self-help model" fails to provide a satisfactory account of regulation involving monetary or mutilation penalties for bodily mutilation. His probing of the "self-help model" raises several questions about the historical development of state institutions. These archaic regulations which were long forgotten in medieval Europe reflected a cultural

28. K.W. Nörr, *Zur Stellung des Richters im Gelehrten Prozess der Frühzeit*, Munich 1967, 104 pp.

29. For further discussion, see P. Stein, *Legal Institutions: the Development of Dispute Settlement*, London 1984, 236 pp.

30. K. Fischer Drew, *Public vs. Private Enforcement of the Law in the Early Middle Ages*, 70 *Chicago-Kent Law Review* 1583 (1995).

31. L. Fowler-Magerl, *Ordo iudiciorum vel ordo iudiciarius: Begriff und Literaturgattung*, (Ius Commune, Sonderhefte 19), Francfort am Main 1984, 341 pp.

32. On the development of appellate procedure, see the important study by A. Padoa Schioppa, *Ricerche sull'appello nel diritto intermedio*, Università di Milano, Pubblicazioni della facoltà di Giurisprudenza, ser. 2, Studi di Storia del Diritto, n. 2, 4, Milan 1967.

33. J. Whitman, *At the Origins of Law and the State: Supervision of Violence, Mutilation of Bodies, or Setting of Prices?*, 71 *Chicago-Kent Law Review* (forthcoming 1996).

predicament in which private violence and public regulation coexisted within the same social system. The eighteenth- and nineteenth-century belief in the civilizing value of the legal order as opposed to the ruthlessness of primitive society expressed undoubtedly a particular ideology. But behind such a model and its interpretation, we can sense the significance of the ancient legal tradition which was so influential in the shaping of the modern Western legal culture and supplied the foundations of the political reason.

